



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

CRS
Docket No: 2394-00
22 December 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 19 December 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by Headquarters Marine Corps dated 6 June and 6 October 2000, copies of which are attached. The Board also considered your rebuttal statement of 15 October 2000.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinions. The Board additionally noted that you were never tried by civil authorities. Therefore, the provisions of paragraph 0124 of the JAGMAN did not apply to you. Additionally, as you yourself note in your rebuttal statement, that paragraph does not render any rights on an individual. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070

JAM4

06 JUN 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE [REDACTED]

1. We are asked to provide an opinion on Petitioner's request for: (1) removal from his Official Military Personnel File of all entries related to his nonjudicial punishment (NJP) of 12 August 1998, and restoration of all property, privileges, and rights affected by that NJP; (2) removal of the adverse fitness report he received on 12 August 1998; (3) reinstatement of his security clearance; and (4) upgrade of his reenlistment eligibility code. Although not explicitly requested, Petitioner also effectively requests consideration by a remedial promotion board.

2. We recommend that the requested relief be denied. Should BCNR grant petitioner's request to remove all record of the allegedly improper NJP, however, we recommend that the Petitioner be informed that he may to seek reconsideration for promotion from CMC (MMPR-2). Our analysis follows.

3. Background

a. On 8 August 1998, Petitioner failed to comply with the instructions of a Macon, Georgia, police officer, and nearly hit the officer with his car. The officer issued a "look-out" on the vehicle. Petitioner was stopped shortly thereafter. The officers involved noticed a strong odor of alcohol on Petitioner's breath. Petitioner was arrested and subsequently administered a Breathalyzer test, which resulted in a .091 percent blood alcohol content reading. As a result of the incident, Petitioner was issued a citation for driving under the influence and reckless driving.

b. On 12 August 1998, Petitioner's commanding officer imposed NJP for a violation of Article 111, UCMJ, drunken driving. Before accepting NJP, Petitioner consulted with an attorney and was advised of his right to refuse NJP and demand a trial by court-martial. Petitioner accepted NJP, pleaded guilty

ENCL (1)

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

to the charge, and was awarded a reduction in grade to corporal,¹ forfeiture of \$689.00 each month for two months, and 45 days restriction. One month of the forfeitures was suspended for six months. Petitioner was advised of his right to appeal the punishment and the procedure for doing so, but declined to appeal his NJP.

c. On 19 October 1999, the Georgia State Court for Bibbs County, Georgia entered a judgment of nolle prosequi in Petitioner's case. As a result, the State charges against the Petitioner were dismissed prior to adjudication and without prejudice.²

4. Analysis. Petitioner asserts that imposition of NJP was improper where he was pending State charges for the same offense and where those charges were ultimately dismissed. This argument is without merit. Although nonjudicial punishment "may not be imposed for an offense tried by a State or foreign court unless authorized by regulation of the secretary concerned," Manual for Courts-Martial, United States, Part V, par. 1f(5), Petitioner's NJP occurred prior to any civilian proceedings. JAGINST 5800.7c (JAGMAN) likewise authorizes NJP in cases where there has been no trial. As indicated above, Petitioner was never "tried" in a civilian court. Rather, the state moved for and was granted a motion for nolle prosequi, and the case was dismissed prior to it ever being tried.

5. Conclusion. Accordingly, for the reasons noted, we recommend that the requested relief be denied.

M. W. Fisher, Jr.

M. W. FISHER, JR.
Head, Military Law Branch
Judge Advocate Division

¹ Petitioner has subsequently been promoted back to the grade of sergeant.

² Under Georgia law, nolle prosequi is not an adjudication on the merits, and represents only the State's decision not to pursue a case further. Hunter v. State, 122 S.E.2d 172 (Ga. App. 1961)



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1610
MMER/PERB
6 OCT 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
[REDACTED]

Ref: (a) Sergeant [REDACTED] DD Form 149 of 30 Mar 00
(b) MCO P1610.7D w/Ch 1-5

Encl: (1) CMC Advisory Opinion 1070 JAM4 of 6 Jun 00

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 4 October 2000 to consider Sergeant Wilson's petition contained in reference (a). Removal of the fitness report for the period 980301 to 980812 (GC) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends that since the State Court of Georgia dismissed DUI charges via a plea bargain, the nonjudicial punishment (NJP) reflected in the challenged report should have never occurred. To substantiate his appeal, the petitioner furnishes several items of support, to include a document from the State Court Bibb County, Georgia indicating his case had been nolle prossed.

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed.

a. Regardless of what the State of Georgia decided in the petitioner's case, the NJP nevertheless occurred and was correctly recorded via the performance evaluation system. This is an uncontroverted matter of fact, so acknowledged by the petitioner.

b. In their Advisory Opinion contained at the enclosure, the Judge Advocate Division, Headquarters U.S. Marine Corps, made a determination concerning this case and pointed out that the petitioner had never been "tried" in a civilian court. Instead, the State of Georgia moved for and was granted a motion for nolle prosequi, and the case was dismissed prior to trial.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
S [REDACTED]

c. The exact reason for the action by the State of Georgia is not known. However, and although complete speculation on the part of the Board, we believe that since the petitioner had been the subject of disciplinary action by the Marine Corps for DUI, the State of Georgia may have decided that that was sufficient punishment. The sequence of events certainly lends itself to such a conclusion (i.e., 8 August 98 - petitioner was arrested, given a breathalyzer test and cited for driving under the influence and reckless driving; 12 August 98 - petitioner was the subject of NJP; 19 October 99 - State of Georgia granted a motion for nolle prosequi).

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of ~~the~~ official military record.

5. The case is forwarded for final action.

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps